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In the Supreme Court of the United States

OCTOBER TERM, 1957

EDGEWOOD AMERICAN LEGION POST #448, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 246 F. 2d 1. (Pet. 11–17.) The findings of fact and conclusions of law of the District Court (R. 6–13[1]) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1957, and a petition for rehearing was denied on September 9, 1957. The petition for certiorari was filed on December 9, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

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[1] Record references are to the appendix to the taxpayer's brief in the Court of Appeals.

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the United States, seeking to recover a wagering tax against the taxpayer on the proceeds of a baseball pool and a lottery, was not estopped by a prior judgment entered by a state probate court in a proceeding to which the taxpayer was not a party and which involved only the liability of a third party for the wagering tax on the proceeds of the lottery.

2. Whether the Court of Appeals correctly held that the baseball pool comprised a wagering pool with respect to a sports event or contest and that hence the exemption from the wagering tax did not apply.

3. Whether the Court of Appeals correctly held that the taxpayer's extensive lottery activities were likewise not entitled to the wagering tax exemption.

STATUTE AND REGULATIONS INVOLVED

Sections 101 (8) and 3285 of the Internal Revenue Code of 1939, and Sections 325.20 and 325.24 of Treasury Regulations 132, are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

In this action, the taxpayer, an American Legion Post, sued for a refund of wagering taxes in the amount of $12,499.37 paid by it in 1952 pursuant to an assessment by the Commissioner of Internal Revenue under Section 3285 of the Internal Revenue Code of 1939. The District Court gave judgment for the Government, and the Court of Appeals unanimously affirmed.

As of November 1, 1951, Section 3285 imposed a ten percent excise tax on specified types of wagering. The Commissioner assessed the taxpayer and/or estate of Leo R. Alhand, as joint venturers, taxes and penalties in a total amount of $4,164.33 for the period November 1951 through June 1952 as being due on the operation of the "ABC" lottery, and assessed taxpayer and/or John Brookes, as joint venturers, taxes and penalties for the same period in a total amount of $54,692.74 as being due on the gross receipts of the "Brookes" baseball pool. (R. 6.)

On November 30, 1951, the taxpayer executed a purported bill of sale with John Brookes whereby for a recited consideration of $50 Brookes ostensibly sold the "Brookes" baseball pool (hereafter referred to as the baseball pool), a wagering pool operated by Brookes, to the taxpayer. At the same time, the taxpayer and Brookes entered into a written agreement whereby the taxpayer purported to employ Brookes to manage the baseball pool for a stated salary of $200 per week. (R. 9.) The District Court found that the relationship existing between the taxpayer and Brookes during the operation of the baseball pool was that of joint venturers operating for mutual profit which inured to the benefit of each party. (R. 10.)

The baseball pool was operated by chance, the winners being determined by the runs scored in baseball games during the baseball season. Out-of-season, the winners were also determined by baseball games in the following manner: bank clearings were used to determine which day of a prior baseball season was

to be used to determine the winner; on Saturdays and Sundays when there were no bank clearings, a pea-shake was used to determine which day of a prior baseball season was to be used. (Supp. R. 35–36.)[2] The District Court found that this pool involved wagers placed in a wagering pool with respect to a sports event and that it was conducted for profit. (R. 10.)

On October 31, 1951, the taxpayer purchased from Leo R. Alhand, now deceased, a business known as the "ABC" Lottery (hereafter referred to as the lottery). On that date, a "bill of sale" was executed whereby for a recited consideration of $25 Alhand transferred the lottery to the taxpayer. At the same time, the taxpayer and Alhand entered into a written agreement whereby taxpayer employed Alhand to operate the lottery at a stated salary of $125 per week. (Pet. 11; R. 7.) Prior to this date, Alhand had operated the business as a weekly lottery. (R. 9.) The winners in the lottery were determined by the use of lettered and numbered peas in a partitioned box. Upon shaking the box, the peas were dropped in a slide. (Supp. R. 35.)

Prior to the instant action and after the above assessments had been made, a claim based upon the assessments was filed by the United States against the estate of Leo R. Alhand. After a trial upon the merits of this claim, the Probate Court of Marion County, Indiana, rendered judgment in favor of the estate and against the United States. (R. 8.) In its

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[2] "Supp. R." refers to Appendix B to the Government's brief in the Court of Appeals.

decision, the Probate Court stated, *inter alia*, that Edgewood American Legion Post #448, Inc., is not a person liable for wagering excise tax under Section 3285 (b) (2) (B) of the Internal Revenue Code." (Supp. R. 45.) Taxpayer, however, was not a party to this proceeding in the Probate Court.

As of November 1, 1951, the taxpayer was a patriotic and civic organization exempt from federal income tax under the provisions of Section 101 (8) of the Internal Revenue Code of 1939. Since November 1, 1951, there has been no change in the charter or organization of the taxpayer. (R. 8.) Conduct of the lottery and baseball pool was terminated in October 1952 at the request of the District Office of the American Legion. (R. 10.)

In affirming the District Court's dismissal of taxpayer's complaint, the Court of Appeals held that the Government was not estopped by the Indiana Probate Court's statement as to taxpayer's claimed exemption and that taxpayer's gambling operations fell within the scope of Section 3285.

ARGUMENT

Contrary to the assertions of the taxpayer, this case does not involve any questions of importance. The decision of the Court of Appeals is clearly correct and does not conflict with the decision of any other Court of Appeals.

1. The Government is not estopped by the holding of the Probate Court of Marion County, Indiana, in the matter of the estate of Leo R. Alhand, from asserting its right to assess the wagering tax against the taxpayer herein who was not a party in the probate

proceeding. That proceeding involved an action by the Government against the estate of Leo R. Alhand to collect wagering taxes on the lottery, and did not even concern the baseball pool. Under the decisions of this Court, the principles of *res judicata* or collateral estoppel do not apply where, as here, the parties are not the same or in privity, different facts are in controversy, and there is no mutuality of estoppel. See *Commissioner* v. *Sunnen*, 333 U. S. 591.

2. There is no exemption from wagering taxes provided for the receipts of either the baseball pool or the lottery.

The taxpayer, as an American Legion Post, was granted an exemption from federal income taxation under the provisions of Section 101 (8) of the Code (Appendix, *infra*, p. 10). This exemption by its terms refers to income tax only, and thus it cannot apply to the wagering taxes here involved in the absence of a specific provision in the wagering tax sections making it so pertinent. Section 3285 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 10–11), which provides for the imposition of the wagering tax, sets forth only one narrowly worded exemption relevant to such tax. This exemption clearly does not apply to the situation at bar.

Both the District Court and the Court of Appeals held that the baseball pool involved wagers placed in a wagering pool with respect to a sports event and was conducted for profit. The statute imposes the tax on "wagers", which subsection (b) (1) defines to be in material part: "(B) any wager placed in a wagering

pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit." Subsection (b) (2) (B) then declares that the term "lottery" (as used in (C) above) does not include "any drawing conducted by an organization exempt from tax under section 101." Thus, as to wagering pools, there is no exemption whatsoever set forth in the statute.[3] And the finding that the baseball pool involved wagers placed in a pool with respect to a sports event was a finding of fact which is well supported by the testimony of the taxpayer's own witness. (Supp. R. 35–36.)[4]

3. The lottery activities of the Post, like the baseball pool, were of considerable scope and magnitude.

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[3] The Revenue Service, by ruling, has recognized the exclusion of wagering pools such as that here involved from the exemption. M. T. 44, 1952–2 Cum. Bull. 251, 252, issued under the statute, provides as follows:

"Where the winner is determined by the outcome of any designated event or happening, or by bank clearing or similar figures, the operation is not a 'drawing' within the contemplation of the statute. It is believed that the term 'drawing' refers to a physical drawing of a ticket, or the equivalent thereof, such as the use of a wheel or a similar device, whereby the winner is conclusively determined by a number, letter, legend, or symbol, without reference to any other event the happening of which is beyond the control of the operator."

[4] It should also be noted that the tax and penalty due on the baseball pool ($54,692.74) far exceed the tax paid ($12,499.37). Therefore, if taxpayer is not exempt from tax on the pool, there is no overpayment in this action, regardless of whether or not the taxpayer is exempt from tax on the lottery. See, *e. g.*, *Helvering* v. *Taylor*, 293 U. S. 507, 514.

The record shows that the gross profit from sales of tickets for the years 1951 and 1952 (the only years of operation) was $639,753. (R. 10.) The winners of the lottery were determined weekly by use of a pea shake. If this activity is entitled to an exemption, it must fit within that contained in Section 3285 (b) (2):

> The term "lottery" * * * does not include * * * (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

The legislative history of Section 3285 (b) makes it apparent that Congress, by the use of the word "drawing", meant the occasional raffle of a car or other merchandise for some worthy cause.[5] It was felt that limited and worthwhile raffles should not be classed with and taxed with large-scale organized gambling, and the exemption was therefore granted

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[5] Congressman Reed (Chairman of the House Ways and Means Committee) explained the meaning of this Section as follows (97 Cong. Record, Part 5, p. 6896):

"The bill places a ten percent tax on bets, principally those made with bookmakers and lottery operators, and imposes a $50 a year occupational tax on such professional gamblers and their agents. Parimutuel betting is exempt. Activities such as bingo and cards are also exempt, mainly because the type of tax imposed by the bill is not suitable to those games, and because such games are frequently played on a social rather than professional basis. *Moreover, the bill exempts raffles such as are occasionally conducted by churches and veterans' organizations. It is believed that the bill will cover 90 percent or more of the total professional gambling.*" [Emphasis supplied.]

for physical drawings limited as to frequency and scope of operations. This interpretation of the congressional intent is confirmed by two recent cases: *Hessman* v. *Campbell,* 134 F. Supp. 416, 418 (S. D. Ind.), and *Woodard* v. *Campbell,* 134 F. Supp. 258 (S. D. Ind.), affirmed, 235 F. 2d 268 (C. A. 7th). The lottery run by taxpayer is clearly not the sort of drawing Congress intended to exempt from the wagering tax.[6]

CONCLUSION

The decision below is correct, there is no conflict with any other decision, and no reason appears which would warrant review by this Court. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[6] The taxpayer also complains that the court below erred in failing to discuss certain grounds relied upon in part by the District Court as the basis of its decision. However, as the court below stated (Op., p. 5), the rule is well settled that an appellate court "will affirm a proper judgment even though [it] may not agree with all the reasoning employed by the trial court in arriving at the result." See *Helvering* v. *Gowran,* 302 U. S. 238.

APPENDIX

Internal Revenue Code of 1939:

SEC. 101 [as amended by Sec. 391 (c) (1) (A), Revenue Act of 1950, c. 994, 64 Stat. 906, and Sec. 314 (b) (1), Revenue Act of 1951, c. 521, 65 Stat. 452]. EXEMPTIONS FROM TAX ON CORPORATIONS.

Except as provided in paragraph (12) (B) and in supplement U, the following organizations shall be exempt from taxation under this chapter—

* * * * *

(8) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

* * * * *

(26 U. S. C. 1952 ed., Sec. 101.)

SEC. 3285 [as added by Sec. 471, Revenue Act of 1951, *supra*]. TAX.

(a) *Wagers.*—There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) *Definitions.*—For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed

in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

* * * * *

(d) *Persons Liable for Tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

* * * * *

(f) *Territorial Extent.*—The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

(26 U. S. C. 1952 ed., Sec. 3285.)

Treasury Regulations 132, promulgated under the Internal Revenue Code of 1939:

SEC. 325.20. *Effective period.* The tax on wagers imposed by section 3285 is effective with respect to wagers placed on or after November 1, 1951.

SEC. 325.24. *Person liable for tax.*—(a) Every person engaged in the business of accepting wagers with respect to a sports event or a contest is liable for the tax on any such wager accepted by him. Every person who operates a wagering pool or lottery conducted for profit is liable for the tax with respect to any wager or contribution placed in such pool or lottery. To be liable for the tax, it is not necessary that the person engaged in the business of accepting wagers or operating a wagering pool or lottery physically receive the wager or contribution. Any wager or contribution received by an agent or employee on behalf of such person shall be considered to have been accepted by and placed with such person.

(b) If a person engaged in the business of accepting wagers or conducting a lottery or betting pool for profit lays off all or part of the wagers placed with him with another person engaged in the business of accepting wagers or conducting a betting pool or lottery for profit, he shall, notwithstanding such lay-off, be liable for the tax on the wagers or contributions initially accepted by him. See section 325.34 for the credit and refund provisions applicable with respect to laid-off wagers.